

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

GENESIS ELDERCARE PHYSICIAN SERVICES, INC.

DECISION OF THE HEARING OFFICER

Appearances: Stephen A. Duggan Esq., Attorney for the Claimant
K. Joshua Scott Esq., Attorney for the Employer

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid PTO
RSA 275:44 IV liquidated damages

Employer: Genesis Eldercare Physician Services, 101 East State Street, Kennett Square, PA 19348

Date of Hearing: June 11, 2014

Case No. 47794

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on March 17, 2014. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Wage Claim was amended and this was objected to by the employer. The Notice of Hearing was sent to both parties on May 7, 2014. The Wage Claim was filed for \$26,620.80 and there was a request for liquidated damages.

The claimant testified that he was a physician with over twenty years of practice and a specialty in geriatric medicine. He was reviewing positions on line and he received a call from a recruiter. He was hired by Skilled Medical Provider Group by Dr. Paul Bergeron who was the owner/director. The claimant was hired to work in Genesis facilities at a salary of \$240,000.00. His contract was with Skilled Medical Provider Group (SMPG). Although he was introduced to the Genesis team, he was not an employee of Genesis. He started to work for SMPG on September 1, 2013.

On September 19, 2013 the claimant entered into a contract with Genesis for to work at their Ridgewood and Bedford Hills facilities. This was a separate contract from the SMPG contract of several weeks earlier. The claimant felt that he was recruited by SMPG for Genesis and his salary was reduced by \$55,000.00. The contract signed with Genesis was for one year at \$185,000.00

The claimant believes that SMPG hired him so that they could fill positions at Genesis facilities. Dr. Bergeron, owner/director of SMPG was also a Regional Medical Director for Genesis. The claimant believes that his contract with Genesis was a classic "bait and switch" tactic. The New Hampshire part of SMPG was shut down shortly after the claimant started. He then entered into a lesser contract with Genesis because it was immediate work and it was in facilities he was currently working.

The claimant reviewed his concerns with SMPG and Genesis. He feels that he was led to believe that he would get a Medical Director's position and that would close the gap in his lost wages. There was discussion about the Directorship but there was no written guarantee that he would get a position. The claimant felt that this advancement was a possibility but in late 2013 the employer (Genesis) put together a performance improvement plan and there were to be follow-up meetings. The claimant saw this as the employer setting him up to fail and not advance him to a higher position.

The claimant resigned his position and is claiming the lost wages because the two companies, in his opinion, conspired to fill high level positions by placing the employee in a position to fail or to keep working at the lower salary. The claimant feels that the two employers did not have good cause for their action(s) and were willful in their practice and so he is also seeking liquidated damages for the amount of the Wage Claim.

The testimony of Dr. Bergeron states that as SMPG began to "unwind" he felt an obligation to try to place the claimant in a viable position. Although he worked for Genesis he was not in a position to hire new employees. He considered himself a Medical Director and not an employee of Genesis. Dr. Bergeron said that he introduced the claimant to Genesis but never promised a position of Medical Director and he was not a party to the contract negotiations between the claimant and Genesis.

The employer, through witness Denise Spataro, stated that there was a contact with the claimant in August of 2013. She brought a draft copy of how doctors were compensated within the Genesis structure. At that time there was only one other doctor working as an employee in New Hampshire. Dr. Bergeron only works for Genesis, a few hours a week. The witness said that she reviewed the business structure in everything but that of a clinical nature. She did not participate in the hiring of the claimant.

The witness did state that there were no concerns with the claimant's work until between 60 to 90 days of hire. The witness reviewed productivity and saw some problems with the claimant in note completion. Some patient notes were left open.

A series of meetings were held with the claimant and there was a plan to improve. The follow up meeting showed that there was no improvement and before the March 11, 2014 scheduled meeting, the claimant resigned.

The witness did say that the claimant was sent an erroneous listing of the benefit payout. This was corrected but may have caused some initial concern.

Dr. Richard Raskin, Vice-President of Medical Affairs for all of New England, testified that he was the claimant's immediate supervisor. He said that he never interviewed the claimant but did approve of the hiring. He said that he did have a discussion about the Medical Director's position but there were no promises. The witness said that these discussions were early in the claimant's employment and these positions are not "given out on day one".

In January the employer reviewed the claimant's job production up to that point in time. This is a standard procedure within Genesis. The review resulted in a series of meetings designed to help the claimant improve in the job. The concerns were about productivity and accountability. There was a concern about specific numbers and the employer wanted the claimant to see more patients.

The claimant voluntarily resigned his position.

FINDINGS OF FACT

RSA 275:43 I. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing.

RSA 275:43 V. Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due.

This part of the law places an issue such as leave time into the category of wages when the time is due and owing.

RSA 275:44 IV reads: "If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10% of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller; except that, for the purpose of such liquidated damages such failure shall not be deemed to continue after the date of filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition."

This section of the law allows for a claimant to seek liquidated damages up to the amount of the Wage Claim when the decision is in the claimant's favor and the Hearing Officer finds that the employer was willful and did not have good cause for their action(s).

It is the finding of the Hearing Officer, based on the written submissions and the testimony presented for the hearing, that the Wage Claim is invalid. The claimant has the burden to show that there are wages due and owing and he did not meet this burden.

The Hearing Officer finds that the claimant entered into a hiring contract with Skilled Medical Provider Group (SMPG). This arrangement only lasted a short time and the company did not continue to have employees in New Hampshire. One of the principals in this company also did some work for Genesis Eldercare Physician Services, Inc. In this role he worked to get the claimant into a working relationship with Genesis. The claimant met with Genesis and signed a new contract with them and continued to work in his field.

There is no finding that Dr. Bergeron was an agent for Genesis or that he had the power to hire or fire for Genesis. In fact, the testimony shows that he only worked a few hours a week for Genesis.

The new working contract for the claimant was \$55,000.00 less than his contract with SMPG. The claimant believed that he would be offered a position of Medical Director and this would make up for the lost salary. There was never any guarantee of the Medical Director's position being offered to the claimant. The testimony showed that it could have been something in the future but there was no guarantee.

The claimant did not get caught in a "bait and switch" situation. He signed a contract with a company that failed and he then entered into another contract, with another company, and voluntarily resigned from employment. The claimant may have suspected a set up but there is no finding that this happened. The claimant signed his last contract and resigned from the terms of that contract.

There is no finding that there is any leave time due. The employer was credible in that a statement was sent out in error and was then corrected. There is also no finding for liquidated damages.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds the claimant failed to prove by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

All other requests for findings are invalid.

/s/

Thomas F. Hardiman
Hearing Officer

Date of Decision: July 8, 2014

Original: Claimant
cc: Employer
Claimant Attorney
Employer Attorney

TFH/cag